



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[FMCSA-2013-0513]

Registration and Financial Security Requirements for Brokers of Property and Freight Forwarders; Association of Independent Property Brokers and Agents' Exemption Application

AGENCY: Federal Motor Carrier Safety Administration (FMCSA)

ACTION: Notice of application for exemption; request for public comments.

SUMMARY: FMCSA announces that it has received an application from the Association of Independent Property Brokers and Agents (AIPBA) for an exemption for all property brokers and freight forwarders from the \$75,000 bond provision included in section 32918 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), now codified in 49 U.S.C. § 13906. AIPBA filed its request pursuant to 49 U.S.C. § 13541. On September 5, 2013, FMCSA published guidance in the Federal Register concerning section 32918 and on October 1, 2013, the Agency published a final rule amending 49 CFR part 387 to set a minimum \$75,000 surety bond/trust fund requirement for brokers of property and freight forwarders. FMCSA requests comments from all interested parties on AIPBA's exemption request.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number FMCSA-2013-0513, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.

- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.
- *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief of Driver and Carrier Operations, (202) 366-4001 or thomas.yager@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590.

Public Participation and Request for Comments

FMCSA encourages you to participate in this proceeding by submitting comments, data, and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal and/or copyrighted information you provide.

Submitting Comments

If you submit a comment, please include the docket number for this proceeding (FMCSA-2013-0513), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that FMCSA can contact

you if there are questions regarding your submission. However, see the Privacy Act section below regarding availability of this information to the public.

To submit your comment online, go to <http://www.regulations.gov> and click on the “Submit a Comment” box, which will then become highlighted in blue. In the “Document Type” drop down menu, select “Rules,” insert “FMCSA-2013-0513” in the “Keyword” box, and click “Search.” When the new screen appears, click on “Submit a Comment” in the “Actions” column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8 ½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

Viewing Comments and Documents

AIPBA’s exemption application and all public comments are available in the public docket. To view comments filed in this docket, go to <http://www.regulations.gov> and click on the “Read Comments” box in the upper right hand side of the screen. Then, in the “Keyword” box, insert “FMCSA-2013-0513” and click “Search.” Next, click the “Open Docket Folder” in the “Actions” column. Finally, in the “Title” column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Privacy Act

Anyone is able to search the electronic docket for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT Privacy Act system of records notice for the Federal Docket Management System (FDMS) that DOT published in the Federal Register on January 17, 2008 (73 FR 3316).

SUPPLEMENTARY INFORMATION:

Legal Basis

Section 13541 of title 49 of the United States Code (49 U.S.C. § 13541) requires the Secretary of Transportation (Secretary) to exempt a person, class of persons, or a transaction or service from the application, in whole or in part, of a provision of 49 U.S.C. Part B (Chapters 131-149), or to use the exemption authority to modify the application of a provision of 49 U.S.C. Part B (Chapters 131-149) as it applies to such person, class, transaction, or service when the Secretary finds that the application of the provision:

- Is not necessary to carry out the transportation policy of 49 U.S.C. § 13101
- Is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and
- Is in the public interest.

Further, the exemption authority provided by section 13541 “may not be used to relieve a person from the application of, and compliance with, any law, rule, regulation, standard, or order pertaining to cargo loss and damage [or] insurance....” 49 U.S.C. § 13541(e)(1).

AIPBA seeks an exemption from the \$75,000 financial security requirements for brokers and freight forwarders at 49 U.S.C. § 13906 (b) & (c). Section 13906 is located in 49

U.S.C. Part B (chapter 139) and therefore may be considered within the general scope of the exemption authority provided by section 13541. The Secretary may begin a section 13541 exemption proceeding on the application of an interested party. 49 U.S.C. § 13541(b). See, e.g., *Motor Carrier Financial Information Reporting Requirements-Request for Public Comments*, 68 FR 48987 (Aug. 15, 2003). The Secretary may “specify the period of time during which an exemption” is effective and may revoke the exemption “to the extent specified, on finding that application of a provision of [49 U.S.C. Chapters 131-149] to the person, class, or transportation is necessary to carry out the transportation policy of [49 U.S.C.] section 13101.” 49 U.S.C. § 13541(c), (d).

The Administrator of FMCSA has been delegated authority under 49 CFR 1.87 to carry out the functions vested in the Secretary by 49 U.S.C. 13541.

Background

On July 6, 2012, the President signed MAP-21 into law, which included a number of mandatory, non-discretionary changes to FMCSA programs. Some of these changes amended the financial security requirements applicable to property brokers and freight forwarders operating under FMCSA’s jurisdiction. P.L. 112-141, § 32918, 126 Stat. 405 (codified at 49 U.S.C. § 13906(b) & (c)). More specifically, 49 U.S.C. § 13906(b) and (c) requires brokers and freight forwarders to provide evidence of minimum financial security in the amount of \$75,000.

On September 5, 2013, FMCSA published guidance (78 FR 54720) “concerning the implementation of certain provisions of ... (MAP-21) concerning persons acting as a broker or a freight forwarder.” On October 1, 2013, FMCSA issued regulations requiring brokers

and freight forwarders to have a \$75,000 surety bond or trust fund in effect. 49 C.F.R. §§ 387.307(a), 387.403(c). 78 FR 60226, 60233.

On November 14, 2013, after initially filing and dismissing in district court, AIPBA filed a petition for review in the U.S. Court of Appeals for the 11th Circuit. *Association of Independent Property Brokers and Agents, Inc. v. Foxx*, No. 13-15238-D (11th Cir.). The petition alleges the Agency's October 1 final rule was improperly issued without notice and comment.

AIPBA Exemption Application

In an August 14, 2013 letter to the Secretary, AIPBA, through its counsel, requests that the Department “permanently exempt all property brokers and freight forwarders from the \$75,000 broker bond provision of MAP-21” AIPBA argues that the “\$75,000 broker surety bond amount is not necessary to carry out the transportation policy of section 13101, [or] ... to protect shippers from the abuse of market power ... and ... is not in the public interest.” AIPBA seeks a categorical exemption “so that property brokers and forwarders can continue to do business under the existing bond regulations.” A copy of the exemption application is included in the docket referenced at the beginning of this notice.

First, AIPBA believes that the \$75,000 bond requirement is contrary to the transportation policy of 49 U.S.C. 13101 because it violates the federal government's policy of “encourage[ing] fair competition, and reasonable rates for transportation by motor carriers of property” and “allow[ing] a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public....” 49 U.S.C. § 13101(a)(2)(A),(D).

AIPBA also argues that the \$75,000 broker bond requirement “is not necessary to protect shippers from the abuse of market power.” According to AIPBA, “[t]he unnecessarily high \$75,000 broker bond requirement will cause the majority of property brokers to leave the marketplace, which will expose shippers to abuses of market power by the few large property brokers able to stay in business.”

With regard to the public interest, AIPBA believes the new bond requirement will “cause a significant increase in consumer prices once the supply of property brokers is drastically reduced.” AIPBA indicated that a lack of competition will require shippers to pay more for transportation services. In addition to predicting that small and mid-sized brokers will be forced out of the market place due to the new higher bond requirement, AIPBA believes the new requirement will serve as a barrier to entry into the market place for other property brokers.

Finally, while AIPBA acknowledges that “there are certain regulations from which [the Secretary] cannot issue exemptions,” it believes that “the broker bond does not fall into one of the listed categories. Specifically, AIPBA argues that the bond is a financial security rather than a type of required insurance, a distinction emphasized in 49 U.S.C. § 13906 by the choice of a bond or insurance as well as MAP-21’s amendment to 49 U.S.C. § 13906, which still requires the broker bond but deletes all reference to insurance.”

Request for Comments

FMCSA requests public comment on the AIPBA exemption application. Specifically, FMCSA requests comments on whether the Agency should grant or deny the application, in whole or in part. The Agency also requests comments on how it should apply 49 U.S.C. § 13541(a)(1-3) to AIPBA’s request. Additionally,

FMCSA seeks comment on whether the reference to “cargo loss and damage” and/or “insurance” in section 13541(e)(1) bars FMCSA from granting the requested exemption as a matter of law and without application of the three-part statutory test under section 13541(a). Commenters are encouraged to provide data or information concerning the impact of the new bond requirements and/or the impact of granting this exemption request on carriers, brokers, freight forwarders and shippers.

Issued on: December 18, 2013

Larry W. Minor
Associate Administrator for Policy

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